NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND PLANNERS; LANE + KNORR + PLUNKETT, INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVOR OF FIRST INTERSTATE BANK OF ALASKA; FIRST INTERSTATE BANCORPORATION; FIRST INTERSTATE BANK OF OREGON,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO VACATE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI FOR PROCEDURAL ERROR

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DECEMBER 12, 1990.

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DECEMBER 12, 1990.

Motion by Petitioner Michael E. Plunkett to Vacate Order Denying Return for Writ of Certiorari for Procederal Error (not a Petition for Rehearing)

List of Parties: see List of Parties in Respondent First Interstate Bancorp and First Interstate Bank of Oregon Opposition Brief, pages ii-vii.

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5. 12 USC 1441 (b)(4)(10)(F)

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MOTION TO VACATE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI FOR PROCEDURAL ERROR (NOT A PETITION FOR REHEARING)

Comes now Petitioner and moves this court to vacate its order denying Petition for Writ of Certiorari for procedural error. This Motion is accompanied by a Memorandum in support. This is not a Petition for Rehearing. A separate Conditional Petition for Rehearing is being filed should this Motion be denied.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Movant seeks vacation of order denying Petition for Writ of Certiorari because Court prematurely distributed the Petition prior to receipt of Opposition Briefs. As a result, the Court considered the Petition probably without knowledge of existence of an Opposition Brief and without benefit of fact that Respondents other than the Solicitor General felt the Petition had sufficient merit to warrant

prepartation of an Opposition Brief. As a result of the premature distribution the petitioner was not given even a slight opportunity to prepare and file a Reply and/or Supplemental Brief before the Petition was denied on November 26, 1990. Petitioner seeks vacation to enable a small amount of time to submit a Reply Brief to Opposition filed by Respondents First Interstate Bancorp and First Interstate Bank of Oregon.

II. FACTS AND PROCEEDINGS.

Petition was timely filed October 16, 1990 and served on Respondents First Interstate Bancorp ("FIBC"), First Interstate Bank of Oregon ("FIBO"), and Federal Deposit Insurance Corporation ("FDIC") as receiver for First Interstate Bank of Alaska ("FIBA"), formerly Alaska Bank of Commerce ("ABC"). On October 24, 1990, this Court directed Petitioner to

serve the Solicitor general, which was accomplished on October 30, 1990. On November 6, 1990 Solicitor General hand delivered a Waiver to the court without any certificate of service to any Respondents, merely copying Petitioner with an unsigned copy of the waiver. Said waiver made no mention whatsoever that the Solicitor General was appearing on behalf of FDIC per Rule 9, or that Solicitor General was going to be the only Counsel appearing on behalf of Federal Deposit Insurance Corporation ("FDIC").

The Court Clerk, when reading the improperly formed waiver, was apparently led to believe there were no other Respondents other than Solicitor General and therefore distributed the Petition on November 7, 1990. (Supreme Court Record, "SCR" item 4). This premature distribution was a clear violation to Supreme Court Rule 15.1.

FIBO and FIBC filed their combined (hereafter collectively referred to as "FIBO" unless noted otherwise) Opposition brief on November 15, 1990, received by the Court November 19, 1990 and distributed November 21, 1990 ("SCR" 4,5). No copy of certificate of service was mailed to Petitioner. SCR 5 indicates Respondent served FDIC and the Solicitor General not knowing Government had waived its right to respond. During this time the Court was on its Thanksgiving recess from November 14 - 25, (Supreme Court Bulletin, 9/17/90, page 8031) and staff had one working day, November 23, 1990, to review Opposition Brief prior to Court denying Petition on November 26, 1990.

As a result of Supreme Court Rule 29.4(a) Petitioner was awaiting an Opposition due November 30, 1990, prior to preparing a Reply. The denial was received November 29,1990 (a full moon).

The prejudicial effect of the improper and erroneously premature distribution of the Petition was to short circuit any reasonable attempt to file a reply brief. A reply brief was absolutely essential to point out to the court the falsehoods propagated by Respondents FIBO and FIBC and to demonstrate with further excerpts from the record that more evidence existed in the Record at the time summary judgment was ordered in District Court than the FIBO had included in its Opposition Appendix. The reply was further necessary to point out the fallacious legal citations and authorities regarding interpretation of Anderson v. Liberty Lobby Inc. 477 US 242, 106 S.Ct. 2505, 19 L.Ed2d 202(1986)("Anderson"), on summary judgment evidentiary requirements and other false arguments.

Petitioner's wife called the Court on November 30,1990 to obtain copies of all

documents on file in the case. The clerk, claimed the only documents on file in the case were the Petition and Opposition!. On Monday, December 3, 1990, Petitioner called the clerk, Ms. Teckeley, who claimed the following:

(1) Solicitor General represented FDIC

(2) Opposition Brief had been received on November 5, 1990 and the case had been distributed on November 7, 1990.

Petitioner was then put on hold and cut off. A return call placed Petitioner in contact with a Mr. Gullickson who gave a different set of facts as follows:

(a) Petition was distributed on November 7, 1990, prior to time for receipt of Opposition -brief from Respondents FIBO or FIBC.

(b) Opposition brief was received November 19, 1990 and distributed November

21, 1990.

(c) The Record consisted of twelve pages including the docket, exclusive of Petition and Opposition, and that copies of same would be mailed that day.

On December 4, 1990 Gullickson mailed the 12 pages of documents, excluding any documents of distribution of either the Petition or the Opposition (SCR 4). His letter stated the Solicitor General represents the FDIC before the Supreme Court, not necessarily the case. See 12 USC 1141 (b)(4)(10)(F) and 12 USC 1819(b)(2), and 28 USC 518(a)

When Petitioner requested the documents in the record associated with the distribution in writing, Gullickson called on December 14, 1990 to state no such documents existed, that SCR 4 was merely a record entry.

A review of Supreme Court Bulletin indicates that Petitions in which the

Solicitor General is a party are routinely denied in less than 30 days after having been docketed, indicating that denial is routine where the Solicitor General waives its right to respond.

III ARGUMENT

A SUMMARY OF ARGUMENT

1. The court violated its own rules in prematurely distributing the Petition.

2. Said premature distribution was not harmless error but prejudicial to petitioner. It gave the Court the impression that (a) the government was the only respondent and (b) the Government thought the Petition so frivolous as to not warrant an Opposition and (c)from the quick turnaround of receipt of the Petition and issuance of the waiver, about 1 day, the Petition nor Appendix did not even warrant reading.

3. As a result Petitioner was denied a meaningful time frame to issue a Reply

Brief to Opposition by respondents FIBO and FIBC.

4. As a result of the improper service of the waiver, and language of the waiver, said waiver led Petitioner to believe FDIC would file an Opposition, particularly since the Appellate Court's failure to address the dismissal of pendant and ancillary claim against FDIC with prejudice, was a major part of this Petition.

5. As a result of this violation of Supreme Court rules, Petitioner is entitled to vacation of Order denying Petition for Writ of Certiorari, and a reasonable time to prepare, file, and serve a Reply Brief.

6. This motion should be granted in this form as opposed to a petition for rehearing because it is injust to require Petitioner to pay another $200.00 to correct a Court and Solicitor General

error.

7. This motion must be granted in lieu of a petition for rehearing because it is injust to impose the five vote standard for the granting or denial of a Petition for Rehearing when, but for clerical error, Petitioner would have had time to file a reply and/or Supplemental Brief prior to the normal course of decision process by this Court. That is, had not the clerical error been made, Petitioner's documents would have been reviewed on the four vote standard. (petitioner understands this motion is subject to the five vote standard, but this motion only deals with the procedural issue of error.)

8. This Motion must be granted because the issues to be raised in reply or supplemental brief go to the merits of the underlying case, and are needed to point out glaring errors of fact and law

propounded by Respondents FIBO and FIBC.

DETAILED ARGUMENT

1. Analysis of Facts and Proceedings.

The Solicitor General has repeatedly been referred to as the 10th member of this Court. His office and staff ought to know the procedural requirements for certificates of service required by Rule 29. The Solicitor's deliberate refusal to properly certify service of its Waiver (SCR 3) to parties other than Petitioner was a deliberate effort to confuse the record and/or court that the only respondent was the FDIC, and that therefore the Petition was ripe for distribution upon receipt of the waiver. The fact the Waiver was hand carried is additional evidence that the Solicitor probably verbally assured the Court that petition was ripe for distribution when the Waiver was delivered.

The vague language of the Waiver led

Petitioner to think an Opposition was still coming from FDIC. Failure to copy the FIBO/FIBC counsel seems to have led FIBC/FIBO that FDIC would be submitting an Opposition Brief as well since they served both FDIC and the Solicitor (SCR 5).

Solicitor General and Supreme Court have developed a method whereby a petition can be denied without the need to read same. The Solicitor receives the petition and if it immediately issues a waiver, indicates the U.S. has no interest in the Supreme Court granting certiorari. The Supreme Court then routinely denies the Petition without review.

Alternately, the staff of the circuit justice assigned or "cert pool" might read the Petition and recommend disposition to other staffs, but this does not explain the lack of any entries in the docket other than the briefs stated by clerk on November 30, 1990.

Assuming the November 30, 1990 statement was true, no waiver was filed prior to Petitioner's inquiry on November 30,1990 and no distribution ever took place, the denial being accomplished by the clerk without submission to the court.

Under this scenario, once the process was questioned, the Solicitor had to file an original waiver between November 30 and December 3, 1990 without service since FIBO obviously had not received same, and the Court could have stamped copies of the various documents after the fact. (Petitioner finds it hard to believe the Supreme Court of the United States is not sufficiently advanced to use an electric date/time stamp to reduce backdating of documents. (To make a copy to one party a copy without sending the original is an old ploy

Said failure of a docket to exist explains Ms Teckeley's failure to properly

answer when the case was distributed or when the Opposition brief was received (alternately it explains why she mistated the dates to petitioner, that is she realized the court errored in prematurely distributing the petition.

That the case may never have been distributed at all is evidenced by Gullickson's failure to mail the documents on December 3, 1990. He may have had to obtain a signed copy of the waiver from the Solicitor General (the Court may have had an unsigned copy after Petitioner's wife called November 30, 1990), had to develop a docket, and had to come up with the twelve pages he said comprised the record, yet manufacture a docket with distribution documents which did not exist. In short, the docket bears no resemblance to the U.S. District Court docket, or any California court docket.

As certificates of service (according

to Gullickson) are not required to be served on other parties, it is impossible to determine who received what. Saul could avoid Rule 11 sanction for his false statements in the Opposition brief merely by not submitting a signed original. (It is impossible to figure how an original could have been sent by the printer in Nebraska to Freidman in Alaska, thence back to Nebraska, thence to the Supreme Court by November 15, 1990 anyway).

Further, since the distribution of the Opposition brief is on the same entry as the distribution of the Petition, in the worst case scenario, it may well be the Opposition Brief was never distributed to the Court until after this inquiry commenced. Further, certificate of service by the printer does not begin to conform to the Rule 29 requirements. It lacks the proper caption, and caption is improper in that it lists FDIC as the only respondent,

a perpetuation of the error. Soliciter General's waiver made case ripe for distribution.

That Justice O'Conner, assigned the 9th Circuit, or her staff reviewed the Petition and made recommendations to the other justices as part of the "cert Pool" (See The Brethren, Woodard and Armstrong, Avon, 1981, N.Y., pages 323,324, it would be important the Petition Respondents did not include FIBC or FIBO since O'Conner was a Director of First National Bank of Arizona from 1971-1974 (U.S. Supreme Court Bulletin, page 15), a First Interstate Bancorp (then Western Bancorporation) subsidiary, Southern Arizona Bank and Trust Co. merged with said bank on May 14, 1975. Moody's Bank & Finance Manual, 1990 ed. page 1606. This implies O'Conner was once and may still be a stockholder of First Interstate Bank Corporation or a subsidiary. To avoid the appearance of

impropriety, it would be important that the decision to deny the Petition take place prior to circulation of the Opposition brief, to give the appearance the Petition was unworthy on its face, without the need to review the Opposition brief prepared by a company for which a justice or their family may have a financial interest.

In the worst possible scenario, the Petition was not distributed at all, and the Order (unsigned copy sent to Petitioner, SCR 6) was surrepticiously issued by the clerk's staff without authority of the court. With 4500 cases submitted each year this would be easy enough to accomplish.

2. The Court Errored in Prematurely Distributing the Petition

Supreme Court Rule 15.5 is clear that distribution does not occur until the filing of a brief in opposition or expiration of the time to file same.

Instead of distributing on November 7, 1990, the Petition should have been first distributed on November 21,1990. Since neither the Solicitor General nor FDIC entered an appearance for FDIC as required by Rule 9.2. Since FDIC failed to enter a separate notice of appearance indicating it would not be filing a document, Petitioner assumed FDIC would be filing an Opposition brief. Solicitor General's waiver did not indicate the Solicitor General was appearing on behalf of FDIC. Therefore, the Petition should not have been distributed until 30 days after the Petition was received by Solicitor General (about November 5, 1990). Distribution should have taken place December 5, 1990.

3. As a Result of This error Petitioner Is Entitled to Vacation of the Order and Reasonable Time to File Reply and/or Supplemental Brief

As the Court took from November 7, 1990 until November 26, 1990 to decide, it

follows Petitioner should be allowed the same time to file a Reply brief. Assuming Petitioner should have known Solicitor General waived for FDIC, (which is vigorously denied), Petitioner is entitled to 14 days to file a Reply Brief. (This amount is computed by taking the decision time, 19 days and subtracting the time between the date of decision and date of distribution of the Opposition brief, 5 days).

Alternatively, as a result of FDIC failure to comply with Rule 9.2, Solicitor General's failure to comply with Rule 9.2 and 29.3, Petitioner is entitled to 31 days to file a reply brief. (This is calculated by fact the Opposition brief was not due until 30 days after receipt by Solicitor General, or about December 5, 1990. The first day of session after holiday recess is January 6,1990, thus Petitioner should have had 30 days to

file a Reply brief.

Given this bracketing of time, it seems reasonable that the 25 days for Petition for Rehearing would be a reasonable standard and Petitioner hereby seeks 25 days to submit said brief.

4. This Motion Must Be Granted As Limitations on Petition for Rehearing Would Be Unfairly and Unjustly Applied

This Motion in lieu of a Petition for Rehearing must be granted. The Petition for Rehearing goes to the merits of the Petition and is severely limited in scope by Rule 44. Petitioner must not be limited in scope other than that of a Reply Brief per Rule 15.6 and 33. Further, Petitioner should not have to bear the penalty of paying another $200.00 caused by an error by Solicitor General and by the Court Clerk. Further, the purpose of the vacation is to allow the Petitioner to point out misstatements of fact and law in the Opposition brief, which addresses

itself to Rule 15.1 rather than Rule 44.

Most importantly, the five votes required to grant rehearing then grant certiorari is an unfair burden on Petitioner since the reasons for reconsideration are the court and Solicitor's procedural errors, not the intervening circumstances or substantial grounds not previously presented of Rule 44.

5. The Reply Brief Will Go to the Merits of the Petiton for Writ of Certiorari

FIBO and FIBC elected to argue the merits of the factual case in lieu of the many questions of law presented for review by Petitioner. Petitioner stressed reasons of national importance for the review, and took as true the doctrine that this Court does not review factual considerations. However, FIBO/FIBC continued to falsify the facts and misinterpret the law just as it did before the District and Appellate

Courts. (It is for this reason Petitioner is so concerned that this Court received a signed copy of the opposition

a. Misstatements of Fact by FIBO/FIBC

FIBO included six affidavits of Bank officials, one affidavit of Petitioner and the Affidavit of Charles Homan in its Appendix to Opposition brief. It led the Court to believe this was the extent of evidentiary material on file in the case, which is totally false. Other evidentiary material on file in the case include:

1. Verified Complaint, Sept. 1984 with Exhibits. CR 1. Appendix to motion ("AM") 1.

2. Verified Proposed amended complaint, October 11,1985, CR 10, Appendix 3 hereto.

3. Affidavit of Michael E. Plunkett, Sept 10, 1984, CR 4. Appendix to Petition ("Ap") page 102

4. Affidavit of Michael E. Plunkett,

October 11, 1985,CR 12, AP page 90

5. Affidavit of Michael E. Plunkett, October 15, 1985, Cr 14, "AP" page 89

6. Affidavit of Michael E. Plunkett, CR 38, Jan. 27, 1987 , AP page 83.

b.Misstatements of Fact in Opposition (pages numbered refer to FIBO/FIBC opposition brief.)

Page 3. The Second Deed of Trust note, Opposition Appendix J-7,8 is not "a different standardized form" but is a note extension, or Modification of Deed and Trust Note to the second Deed of Trust of February 11,1982. The is a different standardized form, the Deed of Trust Note form is the same form as the 1981 form, as far (as can be remembered since FDIC refuses to produce said document).

Page 3. FIBO states petitioner alleged FIBO "sometimes made loans, to special borrowers, below the published prime rate." This is absolutely false. Petitioner stated in the verified

complaint that FIBO made over 2500 below prime rate loans(Verified Complaint, CR 1, AM 1, page 8).

Page 4. Contrary to FIBO statement, Wilcox Development Co. v. First Interstate Bank of Oregon 815 F.2d 522 (9th Cir.1987)reinstated RICO claims, 815 F2d at 532 and remanded said claims for refiling as a class action. 815 F.2d at 524.

Page 4-5. Contrary to FIBO's "undisputed" evidence at bottom of page 3, it is disputed whether First Interstate Bank of Oregon participated in the loans with Petitioner. Homan Affidavit FIBO Appendix J-3 para 7, states FIBO was participating in loans with ABC at that time but Homan could not remember whether the loans in question were said participatory loans. Plunkett Affidavit, FIBO Appendix I-2 April 25, 1988 states petitioner's understanding was the FIBO

was participating with Alaska Bank of Commerce. (The words "correspond" and "participate" were used interchangeably by petitioner at the time, not knowing the difference. Affidavit of Bock, Appendix K-3, pointed out the difference, but admitted below prime rates were charged to corresponding banks, a further admission the prime rate was falsely defined by FIBA on the face of the notes.

Contrary to FIBO statement (5) on page 5, the evidence was highly disputed on the issue of whether FIBO knew Alaska Bank of Commerce was pegging its prime rate to FIBO prime rate and whether FIBO knew the prime rate was defined on the face of the note as the rate charged FIBO's most credit worthy borrowers. Homan affidavit, FIBO Appendix J-3, clearly stated the purpose of the pegging was for participation between FIBO and FIBA. Petitioner argued and Wilcox, 815 F.2d at

527 & N.4 proves meetings were held between the participating banks to discuss interest rates. FIBO had to have the Deed of Trust Notes with the prime interest rates misdefined on any loan in which FIBO participated. David Belles, Appendix G-2 claims he did not authorize FIBA to peg the prime rate to FIBO and states he had no knowledge it was being done. He obviously did not read the Deed of Trust Notes received by FIBO in the participation loans.

As to FIBO's point (6) on page 5, FIBO admittedly concealed the fact it was discounting loans below its advertised prime rate. Wilcox is inconsistent with the opinion in Michaels Building Co. v. Ameritrust Co., 849 F.2d 674, 676 (6th Cir. 1988) which cited Living Webster Encyclopedia of the English Language (1971), and American Heritage Dictionary of the English Language (1981) definitions

of "prime rate" as "minimum" and "lowest" rates of interest. Michaels was a prime rate case where some defendants defined prime rate as the rate charged the most credit worthy borrowers and held Antitrust, RICO, and pendant claims should not be dismissed.

Page 5. FIBO claims the only evidence provided was as listed thereafter. This is false. See list above of verified complaints and affidavits as well as facts included in Wilcox, 815 F.2d 522-527. Again it is disputed that FIBO participated, and is disputed that FIBO personnel knew, or should have know, on the participation loans, that FIBA had pegged the prime rate to FIBO and misdefined said rate. Further, FIBA staff learned that a class action suit had been filed on this matter. Homan Affidavit, Appendix J-4. They had to have learned from FIBO yet neither FIBO or FIBA did

anything to rectify the misdefined prime rate.

It is Petitioner's principal contention that FIBO had to have known FIBA was defining the prime rate as the rate charged the most credit worthy borrowers and had to know this was fraud or at least innocent misrepresentation Once it learned of this FIBO did nothing to correct the matter. FIBO continues to contend that because Petitioner's loans were not participation loans, FIBO is not culpable. This is false. Petitioners were the victum of a scheme to defraud borrowers, resulting from the participation agreement between banks.

Page 6. The corresponding bank arrangement between FIBO and FIBA was not initially disclosed, FIBO trying to make it look like no relationship at all existed between the two banks, when in fact participation was occurring, calling

into question the veracity of FIBO affidavits, which petitioner moved to strike CR 98 which was denied CR 106. FIBO never did admit to the participation loans (FIBO appendices, F,G,H,K,L,M).

FIBO claims the franchise agreement came after the loans. The first loan was still outstanding when FIBC became franchisor of FIBA. FIBA paid a fee to FIBC and FIBA had to follow certain operational standards made by FIBC such as logos etc. ABC, later FIBA obtained a windfall as a result of FIBO's overstated prime rate, and /or as a result of FIBA's misrepresentation of the definition of the prime rate. Proceeds from that windfall went to FIBC in the form of franchise fees. FIBC therefore profited from the misrepresentation.

Page 6-7. It was brought out at the appellate level that an employment condition for McWhorter was to go to work

for another FIBC affiliate, which he did, FIBA. Appendix M-11.

There are many more facts then the few outlined by Opposition, but Appellate Court chose to ignore all of them, focusing only on the items presented for review by Opposition and the facts FIBO chose to present. FIBO App. A.

c. Misstatements in FIBO Statement of Proceedings

Page 7. Petitioner filed pro se, but complaint was prepared by attorney George Weiss, Appendix 1 hereto.

Page 8. Opposition infers District Court gave Petitioner an opportunity to provide additional facts to support a theory of suppression of competition or sinister domination. This is false. No such additional opportunity was granted Plaintiff after Order of Summary Judgment was issued. Despite the fact Petitioner had supplied the Court with Homan Affidavit (FIBO App. J) which proved FIBO

was participating with FIBO on loans which FIBA had misrepresented the prime rate definition, the District Court audaciously concluded "FIBO and Interstate of Alaska had no relationship whatsoever at the time the subject loans were made." Appendix B-4. This statement was made even after FIBO admitted FIBA was a corresponding bank. This mistatement of fact by District Court was reversible error in itself, and was parroted from FIBO's Memorandum in Support of Defendants' Motion for Summary Judgment etc. page 3. CR 85, " At the time the loans were made, the Alaska Bank of Commerce had no connection whatsoever with either First Interstate Bancorp or First Interstate Bank of Oregon." (Grounds for Rule 11 Sanctions)

Page 8. FIBO falsely states District Court relied on Anderson, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed 2d 265 (1986) ("Celotex") and

Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 415 U.S. 574, 106 S.Ct 1348, 89 L.Ed2d 538 (1986) ("Matsushita")when in fact the Court relied on California Architectural Building Products Inc. v. Franciscan Ceramics Inc.818 F.2d 1466,1468 (9th Cir. 1987)("California"). A case which stated " No longer can it be argued that any disagreement about a material issue of fact precludes summary judgment"

Page 8-9. "The Court held that petitioners' remaining claims all hinged on the allegation of conspiracy, and that petitioner had failed to make any showing whatever thata FIBC or FIBO conspired with any other person or entity in a way relating to plaintiff's loans."

This statement, although an accurate reflection of the District Court order, is absolutely false. It however is the crutch used by the District and Appellate Courts to grant summary judgment on all other claims for relief against FDIC, FIBO and FIBC including RICO, Alaska Consumer Protection Statute violations A.S.

45.50.471 et seq., misrepresentation claims, etc. As a result both the original complaint and Revised Second Amended Complaint are included for Court Review. Appendices 1 and 2 hereto. even if the allegations were all based on the existence of a conspiracy, which is denied, a pro se litigant must be given an opportunity to cure said defects. Noll v. Carlson, 809 F2d 1446-49 (9th Cir 1987), Pleadings of pro se litigants are to be held to a less stringent standard . Haines v. Kerner, 404 US 519, 520-521, 30 L.Ed2d 652, 92 S.Ct 594 (1972).

That Petitioner failed to make "any showing whatever" that FIBC or FIBO conspired with any other person or entity is also false, Petitioner having offered proof of an inference of conspiracy regarding the loan participation program between the banks (ABC and FIBO), and the prime rate pegging used on not just the

loan documents for the participatory loans, but all loans during the participation period, including loans to Petitioner. All such recipients of loans, whether participated in or not were therefore overcharged interest as a result of the misrepresentation and participation agreement.

Page 9. The description by FIBO of the Appellate Court action is also inaccurate. First, Petitioner agrees that mere pegging of the interest rate to interest rate of other banks does not necessarily violate the Sherman Act, or RICO, or comprise a tort or breach of contract. However, Petitioner's claims and evidence proved far more, (1) that a participation program existed between the FIBA and FIBO during the term of the loans, 1981-1984, (2) that pegging was not an independent action as stated by FIBO but a part of the participation program.

FIBA not only pegged the interest rate to that of FIBO but misdefined FIBO's prime rate as the prime rate charged FIBO's most credit worthy borrowers.(3) FIBO had to meet with FIBA on participation loans, Wilcox 815 F.2d at 527, N4 to discuss "interest rates".(4) Therefore FIBO had to have deed of trust notes with the misdefinition on the face for those notes in which FIBO participated. (6) When it had such documents, FIBO concealed the misdefinition, and/or FIBA failed to remedy the defects with Petitioner or any of the class of borrowers so affected, acts in furtherance of the meeting of the minds to defraud Petitioners and to fix interest rates at the falsely defined prime rate.

Thus the court errored in concluding the pegging of the rate was "anything but a legitimate business practice".

Next, FIBO erroneously cites

Appellate Court as stating Petitioner had failed to supply evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation. What the Court said was, "assuming arguendo, that FIBO and FIBC are liable for misrepresentation to Oregon borrowers, there is nothing in the record from which a trier of fact might reasonably conclude that Plunkett has a cause of action against FIBO, FIBA, and FIBC." Thus, for fourth consecutive time, FIBO counsel have rewritten the facts and opinions to suit the nefarious actions of their clients. It also points to the further Appellate error, when it stated Plunkett had no cause of action against <u>any defendant.</u> If nothing else Petitoner has a claim for innocent misrepresetation for mistating the definition of the prime rate on the face of the note against FIBA.

Petitioner also has a claim for

violation of Alaska Consumer Protection statute, A.S 45.50.471 et seq. against FIBA and FIBO jointly and severally.

The appellate court further errored in holding "petitioner had supplied no evidence from which a trier of fact might reasonably conclude that FIBO or FIBC was liable for misrepresentation to petitioner, with whom these banks had no business relationship whatever." Opp. Brief, page 9. The Appellate Court errored in its presumption there must be a business relationship, i.e. contract for a tort, misrepresentation, to occur (this is akin to a theory that the bicyclist must have a contract with the auto driver who runs over her to recover). Further, Petitioner relied on Restatement, (Second) Torts, Sections 531-533 wherein misrepresentation can be indirect. Petition at 46. Petitioner provided evidence, Appendix I-6,7, of telephone

communication with FIBO in which FIBO misrepresented its prime rate for each month requested, since "prime rate" is a term of art meaning "lowest" and "minimum" rate, Michaels Building Co. v. Ameritrust Co., 848 F.2d 674, 676,n. 2 (6th Cir. 1988), which the rates given over the telephone by FIBO clearly were not, Appendix I-7, evidence of a "business relationship between Petitioner and FIBO" and/or misrepresentation by FIBO

Contrary to last sentence in Op. Brief page 9, Appellate Court did not state the District Court had "weighed both state and federal claims" but stated "since all of his claims, both state and federal, were based on an allegation of conspiracy". So again, FIBO miscites the Court in an attempt to cover for Appellate Court's shortcomings including improperly affirming the district court's weighing the credibility of the evidence

FIBO App A-3. If nothing else the Appellate Court misapplied the abuse of discretion standard in its review of the District Court's granting of summary judgment , when it should have reviewed the pendant and ancillary claims summary judgment de novo. FIBO App. A-5

Finally, FIBO fails to mention the Petitioner denied Petition for Rehearing by majority rather than unanimous vote (as presumably the Memorandum was).

d. Misstatements in FIBO Summary of Argument

FIBO argument is a falaciously circular one with the smallest possible radius!

(1) A pro se litigant is not entitled to notice of the change in evidentiary standards necessary to resist a defendants motion for summary judgment (which occurred after the action was filed) and therefore,

(2) because pro se litigant failed to meet the ne unknown evidentiary burden (not stated in the Federal Rules of Civil Procedure, but in Court cases occurring after the complaint was filed and not even appearing in the treatises until after the Motion for summary judgment was briefed), defendants are entitled to summary judgment,

In short, FIBO argues a pro se litigant must practice law, just like an attorney, by keeping apprised of the latest Supreme and Appellate Court Opinions each week, or face disposition on technical grounds.

Page 10. FIBO errors in its presumption FIBC/FIBO had to have knowledge of each loan to be liable for the interest overcharge. FIBO misconstrues the duty imposed by the 10th Circuit in Jaxon v. Circle K Corp. 773 F.2d 1138,1140 (10th Cir. 1985) was "complex

procedural issues" not just need to file affidavits, but also possibility of verifying complaint (which Petitioner did and which FIBO continues to ignore). FIBO misconstrues the germain issue of this case being notice of the change of evidentiary standard as a result of this Court's decisions in Anderson, Celotex and Matsushita. Contrary to FIBO summary, Court's need not explain evidentiary requirements or even changes to those requirements. They merely have to reference treatises, law review articles, or FIBO's cited Federal Rules Decisions article to inform the litigant of the meaning behind the rule. Alternatively, as the Court's are now doing, they can revise FRCP Rule 56 to reflect the changed standard.

e. Misstatements in Argument

I. Misstatements that Pro Se Litigant Is Not Entitled To Prior Advice.

Contrary to FIBO statement, Jacobsen

v. Filler, 790 F.2d 1362 (9th Cir. 1986), Brock v. Hendershott 849 F.2d 339,343 (6th Cir. 1988) are at variance with Jaxon v. Circle K Corp, 773 F.2d 1138,1140 (10th Cir. 1985) and impliedly with Lewis v. Faulkner, 689 F.2d 100,102 (7th Cir. 1982) and said variances are presented here. Namely, whether notice of procedural requirements are owed a pro se litigant. With that goes notice of changes to procedural requirements. By procedural, Cirle K and Jacobsen meant notice of "complex issues" such as need to file affidavits, verified complaints, etc. to resist summary judgment. Alternatively, as suggested by Jacobsen, a rule change is in order rather than special notice to pro se litigants. This is what the Court system is undertaking. Rule 56 revision has just with the last two weeks (according to conversation on 12/17/90 Ann Gardiner with Administrataor of U.S. Courts, been

approved by the Advisory Committee on the Rules of Federal Civil Procedure) and said Rule change will not change the "standards" (conversation with Paul Carrington, Reporter for Advisory Committee, 12/17/90). Said rule change will be submitted to Standing Committee for eventual submission to the Supreme Court and Congress.

A. Misstatements of Law that Standard for Granting Summary Judgment has not Changed in any Manner which would Affect the Outcome as to Petitioner's Claims

On Page 12 et seq., appears to be FIBO's principal argument: that opposing party must rebut moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. and that said standard was in effect long before this court's holding in Anderson, Celotex and Matsushita. FIBO relies on a 1984 article, Summary Judgment Under the Federal Rules: Defining Genuine Issues of

Material Fact, Schwarzer, 99 FRD 465,467 (1984) to falaciously state Anderson, Celotex and Matsushita did not change any standard. Stempel's A Distorted Mirror, the Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process, 49 Ohio State Law Journal 96,181, 1988 summarizes Anderson as " In essence, the Court amended Rule 56 to replace the words 'genuine dispute of material fact' with words akin to ' facts presented by the nonmovant of sufficient weight to convince the trial judge that he or she would not grant a directed verdict for the movant at trial" and "taken together effected major changes in summary judgment doctrine and practice," id at 99, and "these cases, particularly Liberty Lobby effectively rewrote rule 56 without benefit of the proceedings for amending the Federal Rules required by the Rules Enabling Act of 1934." (28 USC 2072 (1982)

id.

Further FIBO admits Anderson et al resolved confusion to insure uniformity. If the Court's were confused, what of the ignorant pro se litigant not informed of the confusion which was resolved, or even where to read the "confusion resolution".

FIBO next infers First National Bank of Arizona v. Cities Service Co. 391 U.S. 253,289, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968) required the same standards established by Anderson et al, which is clearly inconsistent with California Architectural Products Inc. v. Franciscan Ceramics, Inc. 818 F.2d 1466,1468 (9th Cir 1987) which stated "no longer can it be argued that any disagreement about a material issue of fact precludes summary judgment."

At page 15, FIBO again relies on Schwarzer's position paper, which in 1984 was not the law of the land.

FIBO next makes a false leap to conclude that because several other 9th circuit cases have granted summary judgment to movant for lack of evidence of nonmoving party, Petitioner's claim must necessarily also be dismissed. Said cases would be addressed in reply brief.

FIBO next falaciously claims no probative evidence of antitrust, or other theories was provided. Certainly innocent misrepresentation by FIBA was proved. Certainly AS 45.50.471 claim against FIBO, and/or FIBA was proved. Certainly defamation against FIBA was proved. Certainly breach of contract against FIBA was proved. Though factual issues are not normally addressed by this Court, FIBO continues to harp that because there are no facts, (a falsehood) to support the various theories against various defendants, there is no right to trial, or granting of certiorari.

National Bank of Arizona, now (First Interstate Bank of Arizona), a FIBC subsidiary, burden has been met. The triable issue is whether a meeting of the minds existed between FIBA and FIBO/FIBC in the course of the participation agreement whereby FIBO and FIBA would conceal FIBA's misrepresentation of the prime rate on the face of the notes FIBA was using, whether FIBO participated on the loans in question, and regardless if they not participate on the loans in question, whether the advertised prime rate was understood at the time to be the lowest or minimum rate, and whether a price fixing enterprise resulted as a result of the loan participation action between the two banks (that is, whether the prime rate was maintained at an artificially high level due to belief the prime rate, as defined in the notes and as generally understood by the public was the

lowest rate, when in fact it was an average rate. FIBO's conclusion that Petitoner failed to meet the burden of Cities Service is based on the illogical extension of a false premise, (that no evidence was proferred to support a theory). This analysis is further misplaced in that it presumes a nonmovant must raise a genuine issue as to every essential element of a theory. This is false. Nonmovant must, under revised standards, present facts to sustain burden of proof, but under previous standards needed only to raise a genuine issue as to one essential element of each claim.

Even if, arguendo, Petitioner did not meet the Cities standard, it is because as a pro se litigant, no notice of the subtleties of Federal evidentiary requirements was given, such as a list of articles like Schwarzer, or local rule

requirements like Arizona District Court had as outlined in Jacobsen v. Filler, 790 F2d 1362, 1364-6 (9th cir 1986) (Jacobsen").

B. Misstatements that a Pro Se Litigant is Not entitled to Prior Judicial Explanation of Standards for Granting Summary Judgment

First, FIBO misconstrues Faretta v. California, 422 U.S. 806,835, n.46, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), which spoke for much special treatment such as appointment of standby counsel, even over prisoner's objections. The key word is "rules" in "relevent rules of procedural and substantive law." Petitioner complied with Rule 56 to the letter. It did not, and without extensive research, could not, have known the substantive evidentiary burden had drastically changed since the case began.

Next, again FIBO tries to ignore the notice requirement in Jaxon v. Circle K Corp. 773 F2d 1138, 1139-40 (10th Cir.

1985) ("Jaxon") as being far more than notice to file affidavits, " Under these circumstances, we conclude that the district court's failure to grant Jaxon additional time to obtain affidavits or to verify his complaint requires reversal of summary judgment against him.". . ." 'District Courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." citing Garaux v. Pulley, 739 F.2d 437,439 (9th cir. 1984), "The district court abused its discretion by failing to give Jaxon a ''meaningful opportunity to remedy the obvious defects in his summary judgment materials'" Citing Barker v. Norman, 651 F.2d 1107,1128-29 (5th Cir. 1981), "pro se prisoner in civil rights case must have notice of the requirements and reasonable opportunity to submit counteraffidavits" citing Lewis v.

Faulkner, 689 F.2d 100 (7th Cir. 1982). Roseboro v. Garrison, 528 F.2d 309,310 (4th Cir. 1975), Hudson v. Hardy, 412 F.2d 1091,1094-1095, (D.C. Cir. 1968). (emphasis supplied). Again, FIBO wants the notice requirement to concern only Affidavits and ignore the verified complaints, hereto, and "complex issues" notice of "Jaxon". on file in the case. App. 1 to Motion.

FIBO next misconstrues Jacobsen which is inapplicable since it was based on local Arizona rules which required specific factual showing, which Alaska Local rules did not. Petition Appendix, pages 149-153.

FIBO next overstates Petitioner's level of assistance request, and thereby attempts to circumvent applicability of the conflicts of Jacobsen , Brock v. Hendershott 849 F2d 339, 343 (6th Cir 1988), and Jaxon. Petitioner claims notice

of the Rule change would have been sufficient(using the "duck" analogy , Anderson walked like a rule change). Additional discovery would have been attempted (FIBA through FDIC is the culprit which foiled attempts to obtain the hidden information which would have provided more direct evidence that FIBO had in its possesion copies of the loan documents with the misdefinition of the prime rate on them, when they had them, and the period of time they did nothing to correct such obvious misrepresentation). That one loan officer swears(App. G-2) (to avoid prosecution for a felony) he (as opposed to some other officer's knowledge)did not have any knowledge of Petitioner's - loans, or FIBO did not"specifically" (as opposed to "generally") authorize FIBA to peg the prime rate to FIBO's prime rate, is cleverly crafted perjury, highlighting the

depths FIBO will stoop to avoid civil and criminal liability, and the difficulty it has been and would be to obtain materials and facts known only to FIBO (like who holds the loan documents with the misdefinition of the prime rate on them).

For these reasons credibility disputes are particularily inappropriate for summary judgment disposition, especially those involving the affidavit of an interested party concerning facts known only to him. Madison v. Deseret Livestock Co., 574 F.2d 1027,1037 (10th Cir. 1978), Jaxon, 773 F.2d at 1140 n. 2. Court's duty to inform nonmoving party of right to file affidavits is heightened where nonmoving party has superior access to the facts. Johnson v. RAC Corp. 491 F.2d 510,514 (4th Cir. 1974).

FIBO mistakenly analizes the notice provisions of the cases as a "bare procedural requirement", that is lip

service to protect the courts from miscarriage of justice. What FIBO ignores is every pro se case must be taken on its own. Caruth v. Pinckey, 683 F.2d 1044, 1050 (7th Cir. 1982) cert. den. 459 U.S. 1214 (1983), cited in McGlaughlin, Extension of the Right of Access, 55 Fordham Law review,, 1109, 1115. (1987). None of the pro se cases cited involve Antitrust or RICO actions, although their elements can be no more difficult than the poor prisoner having to wrestle with the "invidiously based discriminatory animus" of a 43 U.S.C. 1985 claim. Again it is the essential elements which must be proved on every claim to avoid summary judgment, a drastic change from previous requirements.

Footnote 3, on page 17 requires response. Suddenly, before the Supreme Court of the United States, in a Petition for Writ of Certiorari, Petitioner is somehow obligated to describe for a Court

not concerned with review of the facts at all, what additional facts Petitioner "could now muster" given a reversal. As decribed at Appellate (the appropriate) level, Petitioner would compel response to discovery from FDIC, attempt to obtain additional information from Charles Homan, depose FIBO and FIBC personnel now that Petitioner may be able to afford to do so, propound paper discovery on FIBO, FDIC and FIBC, and submit yet another affidavit describing in excessive detail attempts to obtain financing prior to consummation of these loans and after the loan was called in 1983, the conversations with National Bank of Alaska staff etc., the relationship with Anchorage School District and FIBA (as to Certificates of Deposit, etc.) McWhorter and Frank Kauffman's antics, Jerry Kurtz's statement that 15 borrowers approached FIBA regarding interest overcharges on

learning of the FIBO, Wilcox 815 F2d 522 (9th cir 1987), line of cases, etc. In short, Petitioner will provide direct and circumstantial and documentary evidence sufficient to make a prima facie case of every claim for which FIBO, FIBC and FIBA seek summary judgment. Petitioner has contacted expert witness in Wilcox cases and will obtain affidavit regarding interest overcharges by category and amount.

Regarding ample opportunity to obtain discovery, since Petitioner was not advised of the change in rules to resist summary judgment, Petitioner seeking discovery from FIBO and FIBC, who had already demonstrated their willingness to skew the facts beyond belief would be suicidal. The net result would be a Record filed with admissions, interrogatories and responses all denying everything, making an even stronger case, although falsified,

for FIBO and FIBC, without production of any documentary evidence, even on order to compel.

FIBO again mistates the case of Jaxon on page 18, and falsely states Petitioner sought advice on evidentiary requirements. Petitioner, to guarantee due process, was entitled to notice of the de facto rule change caused by Anderson, Celotex and Matsushita., particularly since the District and Appellate Courts pointed out the defects in petitioner's summary judgments were obvious,"factual paucity" etc. Appendix A-5 (a characterization Petitioner denies). See Jaxon 738 F.2d 1139.

FIBO's arguendum ad horrendum on page 18 may be dismissed as self serving Bar Association Marketing Strategy. No such judicial advocacy, advice, or review is requested or warranted. Mere cross reference, as attachment to local rules

(as State of Alaska Rules used to do, cross referencing treatises etc.) or otherwise is sufficient. Alternatively revision to Rule 56 is warranted and is progressing.

II Misstatements THAT SUMMARY JUDGMENT WAS APPROPRIATE

First, this argument only deals with FIBO and FIBC, not FDIC. Second, FIBO attempts to dampen the merits of any legal appeals by the argument that even if right, Petitioner's claims will still fall for lack of evidence. Again, the lack of evidence is due to lack of notice of evidentiary requirements, and refusal of FDIC to meaningfully respond to Discovery under the guise of caretaker, privacy rights, lack of knowledge (FDIC failed to conduct any investigation whatsoever in preparing answers to interrogatories, and admitted so).

Contrary to FIBO statement, there was

no requirement by any court to distinguish Petitioner's case from Wilcox, and furthermore, said distinction was made by evidence that is undisputed that the prime rate was defined on the face of the notes in which FIBO participated and on Petitioner's notes which was not the case in Wilcox line of cases. Further, in appellant's supplemental brief, Petitioner outlined over 30 cases nationwide dealing with the rate fixing cases, many which defined the prime rate on the note. Again, whether a coconspirator has knowledge of every victim of the conspiracy and/or fraud and/or violation of consumer protection statutes is immaterial.

On page 20, FIBO falsely claims Petitoner failed to produce evidence distinguishing FIBO from the Wilcox cases. The loan participation program with FIBA is the distinguishing element, and the existence of the misrepresented prime rate

definition on the face of the notes in which FIBO participated distinguishes the case from Wilcox. What also distinguishes the case is the evidence taken in the light most favorable to the non moving party stated FIBO discounted over 2500 loans below the advertised prime rate makes the falsified prime rate a price fixing conspiracy. That is, by inflating the prime rate, and discounting below it, FIBO and FIBA were able to overcharge the unknowing on the one hand, while inducing the unknowing competitors to keep their prime rates the same, without discounting, thus FIBO and FIBA were able to attract customers seeking discounted loans from other banks while other banks continued to peg their prime rate to an artificially inflated and fraudulently defined rate.

Contrary to FIBO page 20, the inference of conspiracy is sufficient to raise a genuine issue for trial. The

lockstep arrangement of FIBO discounting 2500 loans while FIBA falsifies the prime rate definition as part of a participation program victimized countless borrowers, whether FIBO participated or not in the specific loans.

FIBO cites Cities on page 21, which states a claimant is not entitled to trial when no probative evidence is submitted. As Petitioner submitted some probative evidence, and as FIBO and FIBC admitted to other (that meetings were necessary and held on participation loans to discuss interest rates, Wilcox, 815 F.2d at 527), and as Petitioner is prepared to obtain and through discovery produce much more evidence, now that it understands the burden now imposed, Cities is inapplicable.

Once again, FIBO lies on page 21 when it claims no evidence was proferred to sustain any state or RICO claims. This is

absolutely false. See Appendix 1 hereto, Affidavits and verified complaint. Again on prime rate definition, FIBO failed to deny or otherwise point out no genuine issue of material fact existed on RICO claims so summary judgment should have been denied on this claim in the first instance. Next, FIBO position is contrary to Michaels Building Co. 848 F.2d 672, at 676 n. 2 where the prime rate is a term of art understood as the lowest or minimum rate. As such, FIBO and FIBC concealed and omitted their different definition, another brand of misrepresentation.

Page 22. Pendant and Ancillary Claim Misstatements. District Court improperly granted summary judgment to FDIC for failure of Petitioner to file a separate Opposition to FDIC Motion despite the memorandum in Opposition on file which described FIBA culpability at length, and despite the existence on file of verified

complaint, verified amended complaint, affidavits and documentary evidence supporting verified complaint and affidavits. District Court further dismissed with prejudice (apparently) the pendant claims against FDIC even though FDIC did not request summary judgment on said claims, and despite the fact no evidence was submitted by FDIC, Nor did FDIC they point out no genuine issue of material fact existed on any of the claims against FDIC. Therefore it was plain error for the court to grant summary judgment as to FDIC given the record before the District Court. It was further plain error for the Appellate Court to uphold summary judgment on the grounds all claims were based on an allegation of conspiracy, as the District Court also wrongly stated. Appendix 2 hereto. The document speaks for itself. Even if it could be construed, which is denied, all claims were based on

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the allegation of conspiracy, pro se Petitioner is entitled to amend to correct the defect.

As to FIBO and FIBC, the court did review affidavits and other elements, however, a prima facie case of RICO, A.S 45.50.471 et seq, A.S. 45.50.562 et seq (State antitrust) claims were also presented. As Alaska has refused to adopt the standard set in Anderson, Moffat v. Brown, 751 P.2d 939,943 & N.5 (Ak. 1988), the genuine issue standard of Alaska should have been used to review the pendant and state claims, since the Federal Courts are obligated to apply Alaska law in deciding state claims. FIBO misapplies United Mineworkers v. Gibbs, 383 U.S. 715,726, 86 S.Ct. 1130, 16 L.Ed 2d 218 (1966) in that said citation holds that pendant claims are to be dimissed for refiling in State Court. Arizona v. Cook Paint &Varnish Co., 541 F.2d 226,227-228,

(9th Cir. 1976) per curium), is inapplicable as pendant claims had been decided by the court at trial (not summary judgment) prior to the Federal Antitrust claim. Id. at 228. "We read Gibbs and Wham-O-Mfg. only to require district courts not to reach out to decide state law questions that need not be decided." Id. District Court or Appellate court did not need to decide State claims. By linking the conspiracy to all claims (wrongly) District Court and Appellate Court fabricated a grounds to "need" to decide state claims. However, it is clear neither court needed to do so. State claims were not based on conspiracy and therefore should have been removed to state court.

IV Conclusion

In the interests of justice, this motion to vacate the Order denying the Petition for Writ of Certiorari must be

granted. Petitioner must be given at least 14 days and no more than 30 days to serve and file a reply Brief. Said brief will state the essential elements of each claim against each respondent and outline the admissable evidence on file in the case with citations to the record to demonstracte Petitioner met his burden under the pre Anderson standards and Alaska state standards for pendant and ancillary claims. It will further demonstrate that the Anderson standards have also been met, or if this Court finds said standards have not been met, it must find said failure to meet these standards is due to FDIC failure to meaningfully respond to discovery requests and/or a result of Petitioners lack of notice of the de facto rule change effectuated by Anderson, Celotex and Matsushita. Reply brief will also address the legal issues raised by FIBO including cases in other

circuits at variance with Wilcox line of cases and cases holding Appellate Court errored in applying Wilcox to the instant case when it should have applied more applicable cases from other circuits.

This Motion should not be converted to a Petition for Rehearing because it is based on procedural error by the court and Petitioner should not be subjected to the $200.00 fine for filing a petition for rehearing, nor should petitioner be subjected to the more stringent requirements of a petition for rehearing, as well as the five vote standard needed to obtain granting of writ of certiorari upon petition for rehearing.

In anticipation of FIBO/FIBC and probably FDIC's Opposition to this Motion on numerous grounds, it had been necessary to in detail, point out to this court the falsifications of fact and law rampant thoughout the opposition Brief and the

Record in this case, counsel for FIBC/FIBO have taken liberty not to sign the original of the Opposition, in hopes Rule 11 sanctions can be evaded.

Opposition Brief failed to address numerous issues presented for review, and in fact elected to rewrite the issues for itself. This is the same procedure used at the Appelalte level to discourage the Court of Appeals from addressing these issues. As a result, it is necessary to file yet another separate Motion to submit the entire record to this Court so that it may evaluate for itself whether supervision over the 9th circuit is in order in this case. By so inspecting the record, it will recognize the blatant disregard for facts of record , verified complaint, and affidavits ignored in reaching its distorted decision

If a non prisoner pro se litigant is entitled in one part of the United States

to notice of even the barest procedural requirements for submitting affidavits, certainly a non prisoner pro se litigant is entitled to de facto notice of changes in the rules of civil procedure, which everyone but respondents FIBO/FIBC agree is the essence of Anderson. Advice has never been the issue, only notice, in the form of local rules as Arizona has, in the form of Rule 56 changes as are being right now promulgated, or in cross reference to case law, treatises relating to changes in the law, law review articles, etc. The judge does not have to evaluate anything.

It has been necessary to point out the errors in FIBO argument and presentation to avoid the obvious opposition: that it is silly to vacate the Denial of Petition because the Petitioner cannot possibly meet his burden, even if given opportunity for reply brief, and therefore it is not judicially economical

to vacate a decision on procedural grounds only to redeny the Petition again. Unlike practicing attorneys versed in the law, a pro se litigant, to avoid manifest injustice, to focus on the issues raised by opposition, or alternatively to point out the issues ignored by the opposition of the law is so vast a pro se litigant, without benefit of education in legal theory is at a loss to evaluate the merits of one issue over another and therefore must present all, saving the loans and emphasis for the reply breif.

I certify this motion is not for the purpose of delay is presented in good faith to remedy a procedural error caused by no faulr of petitioner and is filed pursuant to Rule 21.2(b).

Dated at Manhattan Beach California, this 19th day of December, 1990.

Michael E. Plunkett, Pro se

on his own behalf and on behalf of his

partnership interests in Lane + Knorr + Plunkett, Architects and Planners and Lane + Knorr + Plunkett Investment Company